Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy	)	GN Docket No. 13-86

COMMENTS OF THE PARENTS TELEVISION COUNCIL

The Parents Television Council, representing more than 1.3 million Americans dedicated to protecting children from sex, violence and profanity in entertainment, hereby submits the following reply comments in the above proceeding.

On April 1, 2013, the Office of General Counsel released a public notice explaining that the Commission's Enforcement Bureau had disposed more than one million broadcast indecency complaints filed over the past few years. The Public Notice further explained that the complaints had that been dismissed were beyond the statute of limitations or too stale to pursue, involved cases outside FCC jurisdiction, contained insufficient information, or were foreclosed by settled precedent. However, the Bureau sought to make clear that it was "actively investigating egregious indecency cases and will continue to do so."

Although a cursory reading of this Notice would seem innocuous in that the Commission purports to adjudicate the pending indecency cases involving the most "egregious" material addressed in the better than 1.5 million complaints that amassed at the FCC between 2008 and 2012, in practice the FCC has thrown up additional, extralegal roadblocks to the enforcement of

federal broadcast decency law, has failed in its responsibility to adjudicate complaints based on the merits on each case while inexplicably claiming that it has not changed any policy, and will potentially give rise to even more litigation from broadcasters who have demonstrated a willingness to use the Commission's historical unevenness in enforcement as a reason to request judicial relief.

As a matter of law, 18 USC § 1464 is clear with regard to the broadcast of obscene, indecent, or profane language:

> *"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."*

Moreover, the Commission's implementing rule is also quite clear as it defines broadcast decency standards:

> *"language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."*

In 2006, the broadcast networks filed suit challenging federal broadcast decency law and a number of enforcement actions taken by the FCC. Ultimately, the Supreme Court sided against them and refused their request to obviate the law. In addition, Chief Justice Roberts, in his concurrence in *FCC v CBS* (the "Janet Jackson" case) was quite clear when he wrote:

> *"It is now clear that the brevity of an indecent broadcast—be it word or image—cannot immunize it from FCC censure. See, e.g., In re Young Broadcasting of San Francisco, Inc. 19 FCC Rcd. 1751 (2004) (censuring a broadcast despite the 'fleeting' nature of the nudity involved). Any future 'wardrobe malfunctions' will not be protected…"*

Of particular note for the Commission in this proceeding is the fact that in neither the statute nor in the FCC's rule does the word "egregious" appear. In addition, the only use of the term "egregious" in the recent jurisprudence on the matter runs apparently contrary to what

the Commission has already done. To wit, as Justice Scalia wrote for the Supreme Court in *FCC v. Fox Television Stations, Inc. (2009)* (the "Fox 1" case):

> *First, the FCC did not need empirical evidence proving that fleeting expletives constitute harmful "first blows" to children; it suffices to know that children mimic behavior they observe. Second, the court of appeals' finding that fidelity to the FCC's "first blow" theory would require a categorical ban on all broadcasts of expletives is not responsive to the actual policy under review since the FCC has always evaluated the patent offensiveness of words and statements in relation to the context in which they were broadcast. The FCC's decision to retain some discretion in less egregious cases does not invalidate its regulation of the broadcasts under review. Third, the FCC's prediction that a per se exemption for fleeting expletives would lead to their increased use merits deference and makes entire sense.*

The question that is begged by this Public Notice is simple: how can material that meets the FCC's own standard of "patently offensive" not meet a would-be standard of "egregiousness?" It is also unclear what the definition of "egregious" as used by the Enforcement Bureau to dismiss more than 1 million duly-filed indecency complaints was.

Given the overwhelming outcry of the American people on the subject of broadcast indecency, as evidenced by the large number of complaints filed, no one would begrudge the Commission in wishing to deal with more "egregious" cases first. However, this must not be done to the exclusion of enforcement in other pending, perhaps less startling cases. Either material is legally indecent or it is not. The Commission has the ability, as any federal agency does, to use its discretion in the meting out of punishment for violation of the law. In other words, the FCC could fine a broadcaster a larger sum for material it seems egregious, and conversely a smaller fine – or perhaps no fine, for example, just a warning – for a less startling, but still indecent, broadcast.

Unfortunately, this is not what the Enforcement Bureau has done. At the instruction of the now-departed Chairman Julius Genachowski, apparently acting unilaterally, it has instead

applied the "egregious" standard to the then-backlog of more than 1.5 million complaints. This was done with no guidance from the full Commission, no further Congressional action since a ten-fold increase in the FCC's fining authority in 2006, no compelling changes mandated from any Court, nor any public comment at the time. It has created a new de facto standard out of whole cloth and only now seeks public comment on the issue.

Since more than 1 million broadcast indecency complaints were dismissed, there must now be approximately 400,000 outstanding complaints before the Commission. Is it reasonable to presume that these complaints made it past an initial screening for "egregiousness," and if so what is to become of those complaints? This is left entirely unaddressed in the Public Notice. As a matter of course and law is that material that is in fact patently offensive is, by any reasonable standard, egregious. This is why the law prohibits its broadcast at certain times of day when children are most likely to be in the audience in the first place.

We recommend the Commission take the following steps to ensure the clear, consistent enforcement of federal broadcast decency law:

1) Since no court has compelled the Commission to change its indecency rules, there is no reason to do so. Doing so now, in the wake of the Supreme Court refusing to obviate the law on two separate occasions would lack clarity as well as invite the possibility of further litigation.

2) Should the Commission wish to administer fines based on the "egregiousness" or intensity of indecent material, it is free to do so. However, this does not mean that other violations of the law should escape attention from the Commission. In practice, a more "egregious" violation could be subject to a larger fine.

3) The Commission must deal with the backlog of several hundred thousand indecency complaints in as expeditious manner as possible. The "staleness" of the complaints already dismissed by the Enforcement Bureau was due only to the Commission's own inaction, and constituted no fault on behalf of the filer.

4) Further agency action on broadcast decency enforcement should rightfully be administered at the Commission level and not within the relatively unaccountable agency bureaus.

Respectfully submitted,

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